

UMC PETROLEUM CORP.

IBLA 96-318 & 97-169

Decided December 17, 1998

Appeals from two decisions of the Associate Director and Acting Associate Director for Policy and Management Improvement, Minerals Management Service, denying appeals from seven letters demanding payment of additional royalties attributable to the unauthorized recoupment of royalty overpayments. MMS-95-0034-OCS, MMS-95-0102-OCS, and MMS-95-0183-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

An MMS decision requiring an Outer Continental Shelf oil and gas lessee to pay additional royalty will be affirmed when it appears the lessee unilaterally recouped an alleged royalty overpayment without seeking prior authorization from MMS, by filing a request for repayment within 2 years after making the overpayment, as required by section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1994).

APPEARANCES: Jerry E. Rothrock, Esq., and John C. Crespo, Esq., Washington, D.C., for UMC Petroleum Corporation; Howard W. Chalker, Esq., Geoffrey Heath, Esq., and Peter J. Schaumberg, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

UMC Petroleum Corporation (UMC) has appealed from two decisions of the Associate Director and Acting Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), dated December 5, 1995, and October 21, 1996, denying appeals from seven demand letters. The demand letters, issued by the Chief, Technical Compliance Section, Royalty Management Program (RMP), MMS, required the payment of additional royalties, in the total amount of \$67,478.93, attributable to the unauthorized recoupment

of previous royalty overpayments. <sup>1/</sup> By Order dated June 6, 1997, we consolidated the two appeals for decision by the Board.

The MMS demand letters found that UMC had underpaid its current royalty obligations with respect to production from five Federal Outer Continental Shelf (OCS) oil and gas leases by recouping past royalty overpayments without obtaining prior authorization from MMS, as required by section 10 of the Outer Continental Shelf Lands Act (OCSLA). 43 U.S.C. § 1339 (1994) (repealed effective August 13, 1996, by section 8(b) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (FOGRSFA), Pub. L. No. 104-185, 110 Stat. 1700, 1717). In essence, MMS asserted that each of the recoupments (or credit adjustments) amounted to an underpayment of royalty because it constituted an unauthorized "repayment" improperly taken under section 10 of OCSLA without first satisfying the statutory requirement to file a request for repayment within 2 years of making the overpayment and obtain MMS' approval of the recoupment. 43 U.S.C. § 1339(a) (1994). In their December 1995 and October 1996 decisions, the Associate Director and Acting Associate Director denied UMC's appeals from the seven demand letters because UMC had failed to demonstrate that it had sought and obtained prior authorization from MMS to recoup its past royalty overpayments as required by section 10 of OCSLA or that the credit adjustments fell within one of the categories of transactions not subject to section 10. UMC appealed from the decisions.

In its Supplemental Statements of Reasons for Appeal (SOR) in IBLA 96-318, appellant contends that section 10 of OCSLA does not bar a lessee from reducing a current royalty payment to recoup an admitted royalty overpayment on that lease for a prior month, but rather addresses procedures required to obtain a refund from the U.S. Treasury of overpayments. (SOR at 5-6.) Appellant notes that MMS recognizes that section 10 of OCSLA does not bar unilateral credit adjustments to correct royalty overpayments of certain specific types, citing the January 15, 1993, MMS "Dear Payor" letter. (SOR at Ex. A.) Appellant asserts that section 10 was never intended

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<sup>1/</sup> UMC is the successor-in-interest to Norfolk Resources, Inc. The case docketed by MMS as MMS-95-0034-OCS was UMC's appeal from four demand letters, dated Nov. 23, 1994, which required payment of additional royalties in the amount of \$9,352.30. The case docketed by MMS as MMS-95-0102-OCS was UMC's appeal from one demand letter, dated Jan. 10, 1995, which required payment of additional royalties in the amount of \$8,880.98. These two cases were consolidated by MMS and decided by the Associate Director in her Dec. 5, 1995, Decision. The subsequent appeal to the Board was docketed as IBLA 96-318. The case docketed by MMS as MMS-95-0183-OCS was UMC's appeal from two demand letters, dated Feb. 24, 1995, which required payment of additional royalties in the amount of \$49,245.65.

This case was decided by the Acting Associate Director in his Oct. 21, 1996, Decision. The subsequent appeal to the Board was docketed as IBLA 97-169.

to provide a royalty windfall and that the erroneous interpretation of the provision by MMS was confirmed when Congress enacted section 5 of FOGRSFA authorizing unilateral recoupment of royalty overpayments. FOGRSFA, § 5, 110 Stat. 1710-12 (codified at 30 U.S.C.A. § 1721a (West. Supp. 1998)). Appellant further argues that the MMS decisions concluded without an evidentiary basis in the record that the recoupment of the overpayments was not authorized by MMS and must be reversed for this reason. (SOR at 8-9.)

Additionally, appellant asserts that the purpose of an audit is to determine the amount of royalty owing on the lease under audit, citing Forest Oil Corp., 113 IBLA 30, 97 I.D. 11 (1990). <sup>2/</sup> Noting that the decisions fail to acknowledge "admitted royalty overpayments," appellant contends the record does not establish that there was a net underpayment of royalties. (SOR at 9-10.) Appellant also disputes the assessment of interest on the recoupments when the royalty obligation has actually been overpaid. Id. at 10-11.

[1] Section 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1994), requires the Secretary to repay to any person the amount in excess of that which he was legally required to pay when "it appears to the satisfaction of the Secretary" that he has done so and "a request for repayment of such excess is filed with the Secretary within two years after making of the payment."

(Emphasis added.) It is well established that the relief afforded by section 10(a) of OCSLA is available to an oil and gas lessee who has overpaid royalties, provided that he has submitted a request for repayment within 2 years of the date of making payment. Chevron U.S.A., Inc. v. United States, 923 F.2d 830, 833 (Fed. Cir.), cert. denied, 502 U.S. 855 (1991); Mesa Petroleum Co., 107 IBLA 184, 190 (1989). The limitation of section 10 to refunds requested within 2 years of the overpayment has been held to apply not only to cash refunds, but also to allowance of a credit (recoupment) against royalty obligations. Santa Fe Energy Co., 107 IBLA 121, 123 (1989); Solicitor's Opinion M-36942, Refunds and Credits under the Outer Continental Shelf Lands Act, 88 I.D. 1090, 1099 (1981); see Kerr-McGee Corp., 103 IBLA 338, 339-40 (1988). <sup>3/</sup>

<sup>2/</sup> Reaffirmed, 116 IBLA 176, 97 I.D. 239 (On Reconsideration), overruled in part, Mesa Operating Ltd. Partnership, 98 I.D. 193 (1990) (Secretarial Decision), reversed in part, 9 OHA 68, 98 I.D. 248 (1991) (following Secretarial Decision).

<sup>3/</sup> We do not find that passage by Congress of section 5 of FOGRSFA, authorizing unilateral recoupment of royalty overpayments prospectively, undercuts the Department's interpretation of section 10. We note that Congress specified in § 11, 110 Stat. 1717, that the "amendments made by this Act, shall apply with respect to the production of oil and gas after the first day of the month following the date of the enactment of this Act." As we stated in Taylor Energy Co., 139 IBLA 395, 397-98 n.2 (1997), the legislative history indicates:

"With respect to the repeal of section 10 of [OCSLA], the committee intends the prospective elimination of the OCSLA-imposed bar to lessees seeking refunds of overpayments more than two years later and the establishment of the same limitations period for OCS leases as for onshore

In Forest Oil Corp., *supra*, cited by UMC on appeal, we distinguished those cases in which, in the absence of an MMS audit, the Board had upheld MMS decisions applying section 10 of OCSLA to disallow unilateral recoupments of overpayments on Form MMS-2014 without prior authorization (e.g., Mesa Petroleum Co., *supra*; Kerr-McGee Corp., *supra*) from an appeal prompted by an audit of lease royalty payments. In the latter context, we held that it was proper to consider all overpayments and underpayments within the scope of the audit in determining the amount of royalty due to the lessor. The Forest decision was subsequently overruled by the Secretary of the Interior with respect to underpayments resulting from unauthorized unilateral credit adjustments (recoupments), holding that allowance of offsets to such underpayments would effectively permit a payor to obtain a refund without complying with the section 10 procedure. Mesa Operating Ltd. Partnership, 98 I.D. at 197. We are bound to follow this ruling. See Taylor Energy Co., *supra*, at 399. 4/

With respect to the issue of proof regarding lack of authorization, it is true that the only proof in the record that MMS did not approve the recoupments are statements to that effect in each of the demand letters, reporting that MMS had been unable to "match" appellant's "offshore credit adjustments" for the particular leases and months "to [MMS] approvals." See Memoranda to Chief, Appeals Division, MMS, from Chief, Financial Compliance Branch, RMP, MMS, dated May 17, 1995 (MMS-95-0034-OCS and MMS-95-0102-OCS), and Sept. 20, 1995 (MMS-95-0183-OCS), at 1; Answer at 8 ("MMS did all that it was capable of doing to verify the validity of the payor's attempted recoupment"). We think that the fact that MMS reports that it is unable to find, in its records, any prior approval of any of appellant's recoupments is sufficient to shift the burden to appellant to substantiate authorization, given the presumption that MMS employees, acting in their official capacity, have not lost or misplaced legally significant documents. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926); Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1985); James L. Gleave, 112 IBLA 281, 284-85 (1990). Clearly the negative fact of the lack of MMS approval for the recoupments is not amenable to direct proof. Further, evidence that requests for repayment were, at a minimum, filed, whether or not they were approved by MMS, is clearly evidence available to appellant. However, appellant has not provided such evidence, or even suggested that it exists. In these circumstances, we conclude that the burden to prove, by a preponderance of the evidence, that requests for

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fn. 3 (continued)

Federal leases. Therefore, royalties which may have been overpaid for OCSLA lease production prior to enactment of this Act are not affected by this section."

H.R. Rep. No. 104-667, 104th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N. 1442, 1450-51.

4/ Appellant also challenges MMS' demands for "interest" on the additional royalties now deemed to be due. Since we find no demand for interest in any of the MMS demand letters at issue here, this question is not properly before the Board in these appeals. See Answer at 11.

repayment were filed and approved by MMS rests with appellant, and that it has failed to carry that burden. James L. Gleave, 112 IBLA at 285.

Appellant also contends that MMS has itself permitted lessees to recoup a royalty overpayment without first submitting a request for repayment and obtaining MMS approval in certain situations. (SOR at 7.) Appellant cites an attachment to a January 15, 1993, "Dear Payor" letter from the Director, MMS, which set forth eight specific situations in which MMS and the Solicitor hold that the requirements of section 10 of OCSLA do not apply. Solicitor's Opinion M-36977, Applicability of Sec. 10 of the OCSLA, 100 I.D. 418, 431 (1993); SOR at Ex. A. Appellant does not argue that its recoupment of royalty overpayments comes within the ambit of any of these eight situations. See SOR at 7. Nor do we find that to be the case. Rather, UMC argues that MMS has set forth no "rational basis" for distinguishing the instant case from those situations. Id. at 7 n.5.

Appellant's argument does not withstand careful analysis. Review of the Solicitor's Opinion which forms the basis for the exceptions discloses that they relate to (1) payments which did not constitute lease royalty payments, (2) offsets of lease overpayments and underpayments which were first discovered during an audit, (3) offsets across leases resulting from retroactive approval or revision of a unit agreement which did not result in a net royalty credit, (4) adjustments between leases within a unit by a single payor which did not result in a net overpayment, (5) offsets by a payor of past payments within a lease or unit which do not result in recoupment of a net overpayment or a credit against current or future royalty obligations, (6) amounts resulting from overpayment as a result of clerical error which clearly exceed the royalties accurately reported on the appropriate form, (7) recoupment of excess payments to estimated advance royalty deposits, and (8) recoupment of overpayments resulting from underreporting of estimated transportation or processing allowances. 100 I.D. at 420-28. We find recoupment of these types of payments to be fundamentally distinguishable. To the extent they entail an offset of past overpayments against underpayments, the underpayments were not precipitated by payors's decision to unilaterally effect a credit or recoupment of discovered royalty overpayments against current or future royalty obligations. See Mesa Operating Limited Partnership, 98 I.D. at 197.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge